

ENFORCEMENT OF VALUE ADDED TAX ACT VERSUS CONSUMPTION TAX UNDER THE NIGERIA LAW: THE REGISTERED TRUSTEES OF HOTEL OWNERS AND MANAGERS CASE IN PERSPECTIVE*

Abstract

Value Added Tax is used sometimes interchangeably with consumption tax. Whereas Value Added Tax (VAT) is charged and paid on the supply of goods and services generally, consumption tax is however imposed on the sale or use of goods and services mostly consumed in hotels, restaurants, event centres and others. The controversy over who has the power to impose VAT and not consumption tax had prolonged. The VAT by its provisions appears to have covered the field on the taxation of the supply of goods and services including consumption tax. While the states in Nigeria insist that they are entitled to the exclusion of any other body to enact laws on consumption of goods and services, the federal government insists that to the exclusion of any other body it has the power or entitled to impose and collect tax on the supply of all goods and services within the state. The work appraises this controversy and its attendant consequences. The doctrinal method of data collection was adopted and analytical approach used in reviewing the research materials like the constitution, taxing statutes, judicial decisions, textbooks, relevant journals article and internet sources. The paper discovered that the attempt by the states to collect tax and generate revenue on consumption tax greatly encroached on the operation of VAT. The operations of the VAT Act ought to be on inter-state and international trade and commerce. It was further discovered that the major sections of the VAT Act have been nullified leaving the VAT Act totally disjointed. Further enforcement of VAT Act means that a new VAT regime should be enacted. Sections 2, 4, 5, 6,7,8,9, and 11 having been nullified, the VAT Act seized to be a predominant paramount legislation over consumption tax.

Keywords: Tax, Value Added, Consumption tax, residual, covering the field, imposition.

1. Introduction

The Houses of Assembly of several states in Nigeria have always insisted to be the body entitled to the exclusion of any other legislative body to enact laws with regards to the imposition and collection of tax on the supply of all goods and services within the territory of their states. They have followed up this claim with the enactment of laws used to assess and collect such taxes.¹ The states insist on regulating the imposition and collection of the consumption tax.² Value Added Tax act was imposed for the supply of all goods and services in the country which by implication could have covered the field on taxation of goods and services (consumable items) in Nigeria. The VAT Act,³ an act of the National Assembly applies to all goods and services other than those goods and services listed in the first schedule to the Act. The charging clause of the VAT Act⁴ read thus; ‘The tax shall be charged and payable on the supply of all goods and services (in this Act referred to as taxable goods and services) other than those goods and services, listed in the first schedule to this Act’.⁵ From this quote, it does appear that VAT Act had effectively covered the whole field in that regards and to that extent, the provisions of the VAT Act shall prevail over any other law passed by the state House Assembly on consumption of goods and services, which shall to the extent of its inconsistency, be void. The struggle as to whether it is VAT or the imposition of consumption tax by the states, radically affected the collection of tax on supply of goods and services within Nigeria. This is a serious concern to the relevant tax authorities and tax payers. The situation has somewhat degenerated into exposing tax payers to double taxation.

2. Legal Framework for Taxation of Supply of Goods and Services in Nigeria

The constitution⁶ provides that Nigeria shall be a federation constituting of states and a Federal Capital Territory. This defining feature of federation was in recognition of the separateness and independence, of each government that makes up the federation. The sharing of the powers of the Nigeria federation is among the tiers of government. The constitution⁷ provides for the sharing of legislative powers as follows;

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¹ *AG Lagos State v AG federation* Vol. 9 All NTC 331 at 333

² Value Added Tax (amendment) Act (VAT) Act 2007

³ *AG Lagos State v AG Federation, supra*

⁴ VAT Act, 007, s.2

⁵ *Ibid*

⁶ Constitution of the Federal Republic of Nigeria (CFRN), 1999 as amended, S.2(2)

⁷ CFRN, 1999 as amended, S.4(1) to (7)

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- i. The legislative powers of the Federal Republic of Nigeria which shall be vested in the National Assembly for the federation which shall consist of a Senate and a House of Representatives.
- ii. The National Assembly shall have power to make laws for the peace, order and good government of the federation or any part thereof with respect to any matter included in the Exclusive legislative list set out in part 1 of the second schedule to this constitution.
- iii. The power of the National Assembly to make laws for the peace, order and good government of the federation with respect to any matter included in the Exclusive legislative list shall, save as otherwise provided in this constitution be to the exclusion of the House of Assembly of states.
- iv. In addition and without prejudice to the powers concerned by subsection (2) of this section, the National Assembly shall have power to make laws with respect to the following matters that is to say;
 - a. any matter in the concurrent legislative list set out in the first column of part II of the second schedule to the constitution to the extent prescribed in the second column opposite thereto;
 - b. any other matter with respect to which it is empowered to make laws in accordance with the provisions of this constitution.
- v. If any law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail and that other law shall to the extent of the inconsistency, be void.
- vi. The legislative powers of a state of the federation shall be vested in the House of Assembly of the State.
- vii. The House of Assembly of a state shall have power to make laws for the peace, order and good government of the state or any part thereof with respect to the following matters, that is to say;
 - a. any matter not included in the Exclusive legislative list set out in Part 1 of the second schedule to this constitution.
 - b. any matter included in the concurrent legislative list set out in the first column of part 11 of the second schedule to the constitution to the extent prescribed in the second column opposite thereto.
 - c. any other matter with respect to which it is empowered to make laws in accordance with the provisions of this constitution.

Further up, the constitution⁸ provides that the National Assembly shall to the exclusion of the states legislate on the taxation of incomes, profits and capital gains.⁹ The limitation of the National Assembly in the exercise of this power under item 59 is the provisions in the item 62 of the Exclusive Legislative List. Under item 62, it is provided that the National Assembly shall to the exclusion of the state, legislate on Trade and commerce. However, the exercise of this power is further limited to the trade and commerce between Nigeria and other countries including import of commodities into and export of commodities from Nigeria and trade and commerce between the states.¹⁰

Under the concurrent legislative list,¹¹ the National Assembly was granted the following powers; in the exercise of this power to impose any taxes or duty on capital gains; incomes or profits of persons other than companies and documents or transaction by way of stamp duties; that National Assembly may subject to such conditions as it may be prescribed, provide that the collection of any such tax or duty or the administration of the law imposing it shall be carried out by the government of a state or other authority of a state.

Interestingly, there is no constitutional provision expressly providing for the imposition of consumption tax. The constitution merely provided for the taxation of trade and commerce. Black's law dictionary¹² defined trade as the business of buying and selling or battering goods or services. Commerce is the exchange of goods and services especially on a large scale involving transportation between cities, states and nations.¹³

⁸ CFRN, 1999 as amended, s.4 (2)

⁹ *Ibid*, Second schedule, part 1, Exclusive legislative list, item 59, However, this is subject to any other provision in the constitution

¹⁰ *Ibid*, item 62 (a)

¹¹ *Ibid*, concurrent legislative list, item D paragraph 7(a) & (b)

¹² B A Garner, *Black's Law Dictionary*, 11th ed, (Thompson Reuter, St Paul MN, USA, West publishing co:2020)1021

¹³ *Ibid*, p9

A careful reading of the provisions of the constitution above will reveal that the intention or the wordings of the constitution is that the National Assembly shall to the exclusion of the states exercise power to impose tax on trade and commerce between states in Nigeria and between Nigeria and other countries, that is, inter-state trade and international trade and commerce. The states are left to legislate upon the items left after the items expressly mentioned had been subtracted.¹⁴ Interestingly, the power of the National Assembly did not extend to trade and commerce within or intra-state of the state.

Value Added Tax Act

Value Added Tax otherwise called VAT is also described or used interchangeably as consumption tax on goods and services. VAT was intended to replace the Sales tax¹⁵ in 1993. The VAT came in with an enactment as the Value Added Tax Decree¹⁶ and later Value Added Tax Act.¹⁷ The Sales Tax Decree imposed a sales tax on such goods which included sales and services in registered hotels, motel, catering establishments, restaurants and other personal services. The Value Added Tax (Amendment) Act¹⁸ was passed by the National Assembly. The current VAT Act was further amended by the Finance Act.¹⁹ The Act²⁰ substituted a new section 2 of the VAT Act thus;

(2)(1) The tax shall be charged and payable on all supplies of goods and services in Nigeria other than those listed in the first schedule to the Act.

(2) For the purposes of this Act, goods and services consumed or otherwise utilized in Nigeria are supplied in Nigeria.

(3) Notwithstanding the provisions of subsection (1); a taxable supply shall be deemed to take place in Nigeria if-

a. in respect of goods:-

i. the goods are physically present in Nigeria at the time of supply, imported into Nigeria, assembled in Nigeria or installed in Nigeria or

ii. the beneficial owner of the rights in or over the goods is a taxable person in Nigeria and the goods or rights is situated, registered or exercisable in Nigeria;

b. in respect of a service-

i. the services is rendered in Nigeria by a person physically present in Nigeria at the time of providing the service.

ii. The service is provided to and consumed by a person in Nigeria, regardless of whether the service is rendered within or outside Nigeria or whether or not the legal or contractual obligation to render such service rests on a person within or outside Nigeria or

iii. The service is connected with existing immovable property (including the services of agents, experts, engineers, architects, valuers etc) where the property is located in Nigeria, and

c. in respect of an incorporeal

i. the exploitation of the rights is made by a person in Nigeria,.

ii. the rights is registered in Nigeria, assigned to or acquired by a person in Nigeria, regardless of whether the payment for its exploitation is made within or outside Nigeria or

iii. the incorporeal is connected with a tangible or immovable asset located in Nigeria.

It is a further provision of the Act,²¹ that the tax shall be computed at the rate of 7.5% which took effect from 1st February 2020, on the value of all goods and services; except that goods and services listed under part III of the first schedule to the Act which shall be taxed at zero rates.

The Act²² again specified the allocation formula for the proceeds between the federal, state and local governments, thus;

Federal Government	-	-	-	-	15%
State Government and FCT Abuja	-	-	-	-	50% and

¹⁴ *AG Ogun State v Aberuagba & ors*, vol. 3 All NTC 17 at 21

¹⁵ Prior VAT, there were some expenditure taxes like sales tax, exercise duty payable on goods.

¹⁶ Decree No 7, 1986

¹⁷ Cap. V1 LFN,2004

¹⁸ No 53, 2007

¹⁹ Finance Act, 2020, No 4 Vol 108, Government Notice, No1, Federal Republic of Nigeria official Gazette

²⁰ *Ibid*, s.40

²¹ Finance Act, 20, s.42

²² VAT Act, 2007, s.40. However, the provisio to the Act states that the revenue accruing by virtue of the operation of the Act shall be distributed but a derivation principle of not less than 20% shall be reflected in the distribution of the allocation amongst states and local governments.

Local Government - - - - 35%

Imposition of Consumption tax

Consumption tax is a tax imposed on the sale or use of goods and services. This is imposed by various state governments relying on their residual powers to do so. Their insistence is centered on the fact that one cannot find consumption tax on individuals or goods and services consumed in hotels, restaurants and others anywhere in the exclusive legislative list or the concurrent legislative list. Consumption tax is therefore a residual matter within the exclusive power or legislative power of the state.²³ Various states in Nigeria in order to assert this right have enacted consumption tax statutes; which includes;

Sales Tax Laws

(a) Ogun State Government enacted the Ogun State Sales Tax Law in 1982. The relevant provisions of the law that were construed to be offensive are;

i. Section 3(1)

A tax to be known as Sales Tax Law shall be charged in accordance with the provisions of this law on all taxable products brought into the into the state on the supply of goods and services in any inn not exempted from the requirement of registration under this law at the rate specified opposite each class of goods or services in the first schedule to this law.

The contention of the respondents in *AG Ogun State v Aberuagba & ors*²⁴ about the Ogun state sales tax law is that if a state sales tax law does not impose tax with respect to inter-state or international trade and commerce, such a state sales tax law will be valid and proper. On this argument, the court held thus: ‘Section 3(i) and 3(4) (ii) of the law having regard to the words taxable goods brought into the state are unconstitutional as being an interference with item 62(a) of the Exclusive legislatives list, that is, trade and commerce between the states such a state sales tax law will be valid and proper’. It is important to note that the Supreme Court²⁵ held that every state in Nigeria, in the exercise of its legislative powers under the concurrent legislative list can legislate for sales tax within its own state, save that it does not restrict inter-state trade. (b). Lagos State Government enacted the Lagos State Sales Tax Law 1980. The relevant charging clause of this law is;

As from the commencement of this law a tax to be called hereinafter in this law as the sales Tax law, shall be charged in the state subject to and in accordance with the provisions of this law on all chargeable commodities listed in the first column of the schedule this law at the rate specified in the second column of schedule²⁶.

Further, it provides that “every purchaser or consumer of any of the chargeable commodities listed in the schedule shall be liable to pay sales tax at the time of the purchase or at the time of consumption.²⁷ In *Nigeria Soft Drinks Ltd v Attorney General of Lagos State*²⁸, the Lagos state sales tax law was held to be valid because, unlike the Ogun state law, section 2 thereof did not impose tax in respect of taxable goods which prices have been controlled by the federal government. The persons liable to pay tax are purchasers or consumers of any taxable commodities listed in the schedule to the law. In other words, under the Lagos state sales tax law, the tax is not upon the goods but upon the consumers whereas under the Ogun state sales tax law, the charge was upon goods brought into the state.

Hotel Occupancy and Restaurant Consumption Tax Law

The Hotel Occupancy and Restaurant Consumption Tax Law of Lagos State was enacted in 2009. It imposes a tax on any person who pays for the use or possession or for the right to the use or possession of any hotel, hotel facility or event center or who purchases consumable goods and services in any restaurant whether or not located within hotel in Lagos State. In *Prinzel Court Ltd v AG Lagos & ors*²⁹, the court held that having regard to the provisions of the Value Added Tax Act, similar obligations are placed on the taxpayers with the consumption tax. But in *Mas Everest Hotels & Anor v AG Lagos State & Anor*,³⁰ it was held that Hotel Occupancy and Restaurants Consumption Law is within the legislative competence of Lagos State

²³ *AG Lagos State v AG Federation* (2013) 6sc (pt1) 24

²⁴ Vol. 3 ALL NTC 1

²⁵ *Supra* at 3

²⁶ Lagos State Sales Tax Law, cap 175, 1980, s.1

²⁷ *Ibid*, s.2

²⁸ (1987) 3 NWLR (pt 7) 444

²⁹ (2010) 3 TRLN 30

³⁰ Vol 7 All NTC 93

Government. The tax is not charged on the incomes of the claimants but on services rendered by the claimants in the suit. The tax was not *ultra vires* the powers of the Lagos State House of Assembly. Hotel Occupancy and Restaurants Consumption Law imposes tax on any person who pays for the use or possession or for the right to the use or possession of any hotel, hotel facility or event centre or who purchases consumable.

Hotel Occupancy and Restaurant Consumption Tax Law,³¹ and Hotel Occupancy and Restaurant Consumption (Fiscalization) Regulation 2017³²

The law like the principal law provides for the imposition of tax on goods and services consumed in hotels/restaurant and event centre's in Lagos state. The Regulation also aims to implement the said law. In *Ag Lagos State v Eko Hotels*³³, the validity of the state law on matters of consumption tax on individuals on goods and services consumed in hotels, restaurants and others was challenged. Consumption tax on individuals on goods and services consumed in hotels, restaurants and other were absent in either the exclusive or concurrent legislative list but in the residual list. But the court jettisoned the view, stating that VAT Act had covered the field on matters of consumption tax. The Supreme Court stated it in the following terms:-

Suffice for now, that I say that an Act of the National Assembly, for purposes of covering the field, can only be said to be a predominant paramount legislation if it was validly enacted or could be deemed to have been validly enacted with respect to any matter the National Assembly is empowered by the constitution to make laws. An act of the National Assembly enacted in respect of any residual matter not being a matter either in the exclusive or the concurrent legislative list, cannot be arrogated to a predominant paramount legislation so as to override any law validly enacted by the House of Assembly of a state in respect of any residual matter. The determinant factor in covering the field is the validity of the predominant paramount legislation *viz-a-viz* the subordinate legislation.³⁴

In the *Registered Trustees of Hotel Owners and Managers Association of Lagos v AG Lagos & Anor*³⁵, it was held that the various provisions of the VAT Act which dealt with services consumed in hotels, restaurants and event centers are inconsistent with the constitution and the VAT Act therefore was declared void to the extent of its inconsistency with the constitution.

3. Collection of VAT/ Consumption Tax

Taxes and levies (Approved list for collection) Act,³⁶ in paragraph 4 of the Schedule to the Act provides that it is the duty of the federal government to collect value added tax in Nigeria through its agency, the Federal Inland Revenue Service. There was no mention of collection of consumption tax in any statute. By virtue of the provisions of the item 62(1) of the exclusive legislative list, the National Assembly is permitted only to exercise this power to the exclusion of any other on inter-state and international trade and commerce. By this provision, it does appear that the federal government had the powers to collect tax on consumption amongst those to be collected by the states.³⁷ In *Hon. Minister for Justice & AG of the Federation v AG Lagos State*,³⁸ the Supreme Court held that the relevant authorities are to know that the doctrine of covering the field is only applicable where concurrent legislative powers are validly exercised on the same subject matters. The court further held that the Act failed to recognize the residual power of the state, where it is the state that can competently legislate on them to the exclusion of the federal government. By virtue of the decision, the court gave approval for the collection of consumption tax by the state. The conflict continues as the federal government collects VAT while the state collects consumption tax, which has exposed taxpayers to double taxation and invariably increased the cost of supply of goods and services.

4. Court's Intervention and Resolution of the Legislative Quagmire

The court will always intervene to interpret the law with regards to who has the right to either impose or collect one tax or the other. The court does this job by analyzing the salient provision of the law on the issue in contention, for instance, the court is always urged to declare the consumption tax law of a state

³¹ Cap H8, Laws of Lagos State, 2015

³² Cap H8, Lagos State (Amended) and Regulation 2017

³³ (2017) LPLR – 43713 (Sc)

³⁴ *Supra or AG Lagos State v Eko Hotels & Anor* (2018) 36 TLRN 1 at 37

³⁵ (2019) 4 TLRN1

³⁶ Cap T2 Laws of the federation of Nigeria, 2004

³⁷ See; Schedule to the taxed and levies (Approved list for collection) Act Order, 2015)

³⁸ Vol. 8 All NTC 425 at 468, see also *Lakanmi v AG Western Region* (1970) 6 NSC

unconstitutional, illegal, null and void and of no effect whatsoever, since it proposes to collect the same tax for which the value added tax act had provided for effectively. In that instance, the court had to contend with the submission that it is difficult to find consumption tax on individuals on goods and services consumed in hotels, restaurants and the like in the concurrent legislative list.³⁹ Moreover, the state's argument is that the court cannot declare consumption tax to be inconsistent with value added tax since consumption tax come within the state's competence to the exclusion of any other body to impose tax on the sales/consumption of goods and services within the state which is a residual matter.⁴⁰ In *Attorney General of Ogun State v Aberuagba*⁴¹, the Supreme Court held that state cannot enact sales tax law affecting any of the matters in the exclusive legislative list or a sales tax on any item in the concurrent legislative list, which is inconsistent with any law validly made by the federation. The court declared the provisions of section 3(i) and 3(4) (ii) of the Ogun state sales tax law unconstitutional and invalid because the law imposes tax on taxable products brought into the state. This is a matter of interstate trade and commerce within the exclusive legislative power of the federation. But the court noted that the state forming part of the federation has exclusive power of legislating on residual matters.

It was also highlighted that every state in Nigeria in the exercise of its legislative powers under the concurrent legislative list, can legislate for sales tax within its own state, save that it does not restrict inter-state trade. In *Nigeria Soft Drinks v AG Lagos State*⁴², a distinction between the Sales Tax Law Ogun State and that of the Lagos State was made by the court. As that of Ogun State purports to regulate products brought into the state, which is clearly inter-state trade within the provisions of the item 61(a) of the exclusive list, the later, on the other hand, is a tax on purchasers and consumers within the state. The incidence of the sales tax law of Lagos state is not upon the goods but on the persons that consume the goods and differs from the incidence of the Ogun state sales tax law which is on goods brought into the state. Section 2⁴³ of the Lagos State was declared valid and constitutional thereof. In *Mama Cass Restaurant Ltd & ors v Federal Board of Inland Revenue & Anor*⁴⁴, the Federal High Court refused to follow the decision in *Nigeria Soft Drinks case*⁴⁵, but relied on the *Aberuagba's case*.⁴⁶ The court held that the Sales tax law of Lagos State was unconstitutional. The court went further to declare that the value added tax act had covered the field upon which the sales tax law of Lagos State is seeking to provide for. But in *AG Lagos State v Eko Hotels*,⁴⁷ the Supreme Court affirmed the decision of the lower court as it held thus;

As rightly observed by the two lower courts, the goods and services covered by both legislations are the same. It follows that VAT Act has effectively covered the field in that regard. Section 7 (1) of the Act provides that the tax shall be administered by the 2nd respondent. In the circumstances, I am in complete agreement with the court below, which affirmed the finding of the trial court that the VAT Act having covered the field on the issue of sales tax, its provisions prevail over the provisions of the Sales Tax Law of Lagos State.

The controversy about the sales or consumption tax is that the consumption tax of the states interferes with inter-state trade with respect to persons making purchases in a particular state but who are not residents of that state and taking such purchases for retail and distribution in other states. It is on this reasoning that the court held that even if the Lagos State House of Assembly has the requisite competence to enact sales tax law, once an existing federal law or Act of the National Assembly has covered the field, the implication is that the state cannot enact the same. For the states, such purchases made by people who come into the state are made in the particular state and it becomes immaterial what the purchaser does with the product purchased. The states had always relied on the dictum in *Brown v Hoston*,⁴⁸ where the court had this to say: 'No state has power to make any law or regulation which will affect the free and unrestrained intercourse and trade between the state or which will impose any discriminating burden or tax upon the citizens of products of other states coming or brought within its jurisdiction'. It is important to note, that there must be a sale of goods before tax which is known as sales tax or consumption tax can arise. If persons from other

³⁹ *Registered Trustees of Hotel owners and managers Association vs AG Lagos State* (2019) 47 TLRN at 11

⁴⁰ *AG Lagos state v AG federation* (2019) 47 TLRN 1at 11

⁴¹ *AG Lagos State v AG Federation*, supra at 15

⁴² Vol.3 All NTC 133 at 148

⁴³ The charging clause in the law

⁴⁴ (2010) 2 TLRN 98

⁴⁵ *Supra*

⁴⁶ *Supra*

⁴⁷ (2018) 36 TLRN 01

⁴⁸ 114 US 611 at 360

states come into a state to buy for retail or disposition to consumers in another state, the tax becomes payable just as other people resident in the state who buy goods for retail or for consumption must pay the tax. It will be recalled that the imposition of the tax on people who came to purchase goods in a particular state is not tax on goods they are buying. It is a tax on the sales on such goods. Without a sale, there cannot be incidence of taxation.

The controversy as to who is entitled to impose tax on the supply of goods and services with regards to VAT and consumption tax got to the climax in *Registered Trustees of Hotel Owners and Managers Association of Lagos v Attorney-General of Lagos State*.⁴⁹ In the case, the plaintiffs challenged the enforcement of the Hotel occupancy and Restaurant Consumption Law⁵⁰ of Lagos State on the ground that it seeks to impose tax on consumption of goods and services already done by the VAT Act. They urged the court to declare null and void, the law. But the 1st defendant Lagos State submitted that the provisions of VAT Act is inconsistent with the provisions of 1999 constitution and therefore should be declared void to the extent of its inconsistency with the constitution. The grounds for urging the court to do so was that it is *ultra vires* the power of the National Assembly to make a law in that case, VAT Act to impose tax on customers for goods and services consumed in hotels, restaurants and event centre's in the state. The VAT Act said to be unlawful by virtue of section 1(3) of the 1999 constitution as amended. The Lagos State further contended that the Federal Inland Revenue Service is not the lawful and constitutional agency to impose and collect tax on goods and services consumed in hotels, restaurants and event centre's in Lagos State.

After a community reading and construction of sections 2,7, and 46 of the Vat Act *vis-a-vis* the provisions of the exclusive legislative list, the court declared VAT Act inconsistent with the provision of the constitution. Note that section 2 of VAT Act, read thus: 'The tax shall be charged and payable on the supply of all goods and services (in this Act referred to as taxable goods and services) other than those goods and services listed in the first schedule to this Act'. Again under section 46, taxable person means:

A person who independently carries out in any place an economic activity as a producer, wholesale trader, supplier of goods, supplier of services (including mining and related activities) or person exploiting tangible or intangible property for the purpose of obtaining income there from by way of trade or business and includes a person and an agency in government acting in that capacity.

From the charging clause, the tax is charged on the items not listed in the Act, which presumably residual matters left for the state in the constitution. The item not listed in the schedule to the Act, being residual matters is only within the exclusive legislative competence of a state to legislate upon. The implication being that the provisions of Act not being validly enacted may not have covered the field; it did so unconstitutionally and therefore a nullity. The decision in *Registered Trustees of Hotel Owners & Managers* case is significant to the tax jurisprudence in the following,

- i. The decision nullified the major sections of the Value Added Tax Act making its enforcement impracticable.
- ii. It emphatically stated that by the tacit repeal of the schedule by the Taxes and Levies (Approved list for collection) Act order,⁵¹ the Act is self conflicting. It is to be recalled that by the said order, provided the state with the responsibility of collection of consumption tax. The repeal as the law regards it could imply where the two laws are so plainly repugnant to each other that the effect cannot be given to both at the same time.⁵²

Note that the minister in the exercise of her powers under section 2(2) of the said Act, amended part of the schedule to the Act to now include hotels, restaurant and event centre's and same to be under the jurisdiction of the state government.

5. Implication of the nullification of VAT Act and Effects of its amendment by the Finance Act, 2020.

The decision in *Registered Trustees of Hotels owners and Managers Association v AG Lagos State*,⁵³ was delivered on the 3rd day of October, 2019. The decision nullified sections 1,2,4,5 and 12 of the VAT Act,

⁴⁹ *Supra*

⁵⁰ Cap 118, Laws of Lagos State, 2015

⁵¹ Schedule to the Taxes and Levies (Approved list for collection) Act, amendment order, 2015

⁵² In *Olu of Warri Kperegbeyi* (1994) 4 NWLR (pt 339) 416, *Uwaifo v AG Bendel State* (1982) 7SC124

⁵³ *Supra*

making those sections non-existent. Interestingly, the Finance Act,⁵⁴ which commenced operation on 31st day of December, 2020, amended some of the sections of the VAT Act particularly Section 2 of the Act which has been nullified by a court and thereby is nonexistent. A new substituted⁵⁵ section of the VAT Act read thus;

- 2-(1) the tax shall be charged and payable on all supplies of goods and services in Nigeria other than those listed in the first schedule to this Act
- (2) for the purpose of this Act, goods and services consumed or otherwise utilized in Nigeria are supplied in Nigeria.

The above section 2 of VAT Act as at the time of the substitution does not exist; having been erased from the statute book. A repealed statute has ceased to exist and no longer form part of the laws of the land. In other words, the effect of the nullification by the court of competent jurisdiction is that part of the law is dead. Like a dead person, that part of the law can no longer be revived. In *Onagoruwa v IGP*,⁵⁶ it was held that in law, a non-existent statute is dead and cannot be saved or salvaged by the court. In *Madumere v Onuoha*,⁵⁷ it was held that the effect of repealing a statute is to obliterate it completely from the records of the parliament as it had never been passed. It is to be observed that the act of amending or substituting the charging clause which has already been nullified by a court and that particular section given a descent burial, is tantamount to putting something on nothing as held in *UAC v Macfory*.⁵⁸ Regrettably the amendment under the Finance Act was not again considered in a later case of *Uyo Local Government v Akwaibom State Government & Anor*.⁵⁹ In this later case, the Court of Appeal nullified the entire Act or the remaining sections of the Taxes and Levies (Approved list for collection) Act for being inconsistent with the provision of the constitution of the Federal Republic of Nigeria 1999 as amended. VAT Act having been nullified can no longer be enforced and had given way for an unrestricted enforcement within states. Above all, the consumption tax law haven been validly enacted by the State Houses of Assembly and haven not been invalidated by any court of competent jurisdiction, remains a valid law which is enforceable by the state using all legitimate enforcement agencies.

6. Conclusion and Recommendations

The Value Added Tax Act, Sales or Consumption tax laws of the states seem on the face level to be regulating the same trade and commerce, within the state, otherwise known as intra-state trade and commerce. The Federal Government is to control international and inter-state trade and commerce. From the community reading of both legal frameworks for taxation in Nigeria and judicial decisions, it does appear that VAT Act did not cover the field on the taxation of supplies of goods and services. Consumption tax falls within the residual powers of the State House of Assembly to legislate on.

Now that the controversy has ended with the nullification of VAT Act, it is recommended thus;

- i. The federal Inland Revenue Services (FIRS) should stop enforcing a non-existent law with the name VAT Act.
- ii. Except a new act is enacted within the spheres of the authority of the National Assembly to regulate inter-state and international trade and commerce, the FIRS, should stop encroaching within the taxing competence of the states.
- iii. Every state should as a matter of urgency get the House of Assembly to enact a law either as a sales or consumption tax law to control and regulate intra-state trade and commerce particularly consumption of goods and services.
- iv. Amendment of the constitution is a necessity, for instance; item 62 in the exclusive legislative list should be made to reflect on inter- state and international supply of goods and services.

⁵⁴ *Op cit* note 18

⁵⁵ *Ibid*, S.40

⁵⁶ (1991) 75 NWLR (pt 193) 593

⁵⁷ (199) 8 NWLR (pt 615) 422

⁵⁸ (1961) 3 ALL ER 116

⁵⁹(2020) LPELR—49691 CA